No. 97-1396

In The

Supreme Court of the United States

October Term, 1997

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, and DAVID SERENA,

Appellants,

v.

MONTEREY COUNTY, CALIFORNIA, STATE OF CALIFORNIA, et al.,

Appellees.

On Appeal From The United States District Court For The Northern District Of California

STATE APPELLEE'S BRIEF ON THE MERITS

DANIEL E. LUNGREN
Attorney General

LINDA A. CABATIC
Senior Assistant Attorney General

MARSHA A. BEDWELL
Supervising Deputy Attorney General

DANIEL G. STONE
Deputy Attorney General
Counsel of Record

1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5499
Fax: (916) 324-8835

Counsel for Appellee, State of California

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

59 pp

QUESTION PRESENTED

Whether the severe preclearance penalty of the Voting Rights Act, expressly imposed upon those States or political subdivisions identified by the Act's coverage formulae, may be extended to restrain a non-covered State which includes within its borders a covered political subdivision.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

This case was previously before the Court on an interim appeal. *Lopez v. Monterey County*, 519 U.S. 9, 117 S.Ct. 340 (1996) ("*Lopez*"). It is a "coverage case," filed under Section 5 of the Voting Rights Act ("VRA" or "Act," 42 U.S.C. § 1973c), in which Plaintiffs alleged that Monterey County, one of California's 58 counties, failed to obtain required federal preclearance before consolidating seven justice courts and two municipal courts into a single countywide municipal court. Plaintiffs sued only the County, which had been determined to be a covered political subdivision, "as a separate unit," under the Act's coverage formulae. 42 U.S.C. § 1973b(a) and (b). *See* 28 C.F.R. Pt. 51, App.; 35 Fed.Reg. 12354 (July 24, 1970); 36 Fed.Reg. (No. 60) 5809 (Mar. 27, 1971). Plaintiffs successfully opposed the County's early motion to join the State as an indispensable party.

In March 1993, the District Court ruled that the challenged consolidation ordinances effected election changes when promulgated (between 1972 and 1983); accordingly, the County was directed to seek federal preclearance. The County then filed a declaratory judgment action in the District Court for the District of Columbia. However, at the urging of the United States Department of Justice ("USDOJ") and the Plaintiffs (who had intervened),[1] the

---

[1] During oral argument of the interim appeal, Plaintiffs' counsel explained that Plaintiffs and USDOJ influenced the County to drop its court-ordered preclearance effort: "[S]ubsequent to that filing, *we intervened, and as a result of that intervention, as a result of discussion with the Department of Justice*, Monterey County decided that it could not meet its burden of

County dismissed its preclearance action without prejudice and returned with Plaintiffs to the coverage court in California to seek a permanent, substantive, court-ordered "remedial" election plan. As a result, several years of additional litigation ensued in the coverage court. *Lopez*, 117 S.Ct. at 345-346.

Plaintiffs and the County asked the District Court to impose an election plan that would have carved the County into race-based "electoral divisions" prohibited under State law. The State intervened in defense of its statutes and Constitution, and the coverage court declined to order Plaintiffs' requested racial divisions; instead, it enjoined municipal court elections and again directed the County to seek federal preclearance of the countywide court. The County made no attempt to resume its preclearance action, however, and Plaintiffs persisted in demanding a substantive "remedial" order from the coverage court. Eventually, in December 1994, the District Court ordered an "emergency" interim election, directing that the County be divided into four race-based divisions (three of which contained Latino majorities) for purposes of this one-time election.

In November 1995, however, the District Court recognized that this Court's decision in *Miller v. Johnson*, 515 U.S. 900, 115 S.Ct. 2475 (1995) cast "substantial doubt" on the constitutionality of race-based electoral divisions in this context. Noting that a return to the 1968 judicial election system – the status quo – was no longer feasible,

---

demonstrating that several of these county ordinances did not have a retrogressive effect." Official Transcript, Oct. 8, 1996 Argument, pp. 7-8; emphasis added.

the Court directed a one-time countywide judicial election. The Court further ruled that the State should be joined as an indispensable party and permitted to seek dismissal of Plaintiffs' action:

> If the State believes that the County is only administering a State statute and that the failure to preclear the consolidation ordinances is of no significance, it can seek to lift the injunction and have this Section 5 litigation dismissed.

Nov. 1, 1995, Order at 5.

Plaintiffs appealed from the interim order directing a countywide election. During oral argument of that appeal, they admitted for the first time that no substantive harm under the VRA had been established in this coverage action. No court had yet determined whether the County's pre-1983 consolidations harmed, or enhanced, or had any effect whatsoever upon, Latino voting strength.[2]

On November 6, 1996, this Court filed its opinion in *Lopez*, 117 S.Ct. 340. The Court reemphasized the narrowly restricted jurisdiction and the limited remedial

---

[2] QUESTION: And there has never been a determination that there is a substantive violation of Section 5 of the Voting Rights Act?

MR. AVILA: That is correct.

* * * * * * * *

QUESTION: [The County] dropped the suit, and so that leaves us in a posture, as of now, there's been no finding of a substantive violation of section 5.

MR. AVILA: That is correct.

Official Transcript, Oct. 8, 1996 Argument, pp. 7-8.

authority of district courts in Section 5 coverage actions, noting that a coverage court may not consider, much less purport to remedy, "retrogression" or any other substantive violation(s) of the Act. *Id.* at 348-349. The Court's remand order returned Plaintiffs' action to essentially the same status that obtained in 1993, leaving further elections enjoined and again directing the County promptly to submit its historic consolidation ordinances for federal preclearance. The Court also expressly recognized that, on remand, the State would be permitted to raise potentially dispositive threshold issues, including arguments that: (1) after the County promulgated its challenged consolidation ordinances between 1972 and 1983, "intervening changes in California law . . . transformed the County's judicial election scheme into a state plan. . . . "; and (2) "the County is not administering County consolidation ordinances in conducting municipal court elections, but is merely implementing California law, for which § 5 preclearance is not needed." *Lopez*, 117 S.Ct. at 340, 347.[3]

Plaintiffs filed a First Amended Complaint naming the State as a Defendant on October 24, 1996 (J.S.App. 83),

---

[3] Appellants and the United States (collectively "Appellants") argue that their earlier *Lopez* appeal resolved issues which, in fact, the Court *expressly declined to address.* Although this Court concluded that the covered County exercised local discretion *at the time it initially passed its historic consolidation ordinances* (a fact the State has not disputed [Official Transcript, Oct. 8, 1996 Argument, pp. 35-38]), the Court never ruled on the *current* situation or the effect of intervening State law. Those questions were specifically reserved for the District Court on remand. *Id.* at 347.

and the State filed its Motion to Dismiss on November 25, 1996. The State also moved to vacate an order extending the terms of judges elected under the Court's December 1994 race-based division plan. On November 17, 1997, the District Court issued a tentative order granting the State's motions, and on December 12, 1997, the County notified the Court by letter that it had no disagreement with the tentative disposition of the State's motion to dismiss.

On December 19, 1997, the District Court issued its final order and judgment, granting the State's motions to dismiss and to vacate. The Court held that: (1) irrespective of historical County ordinances, the present countywide municipal court is a product of intervening, superseding state law, and of a precleared 1983 ordinance; and (2) the State, which has never been designated a covered jurisdiction under the Act's coverage formulae, is not subject to the Section 5 preclearance penalty. J.S.App. 1-12. Specifically, the coverage court stated that:

> [t]he plain language of [Section 5's opening clause] does not apply to an uncovered state which "enact(s) or seek(s) to administer" a voting plan in a subordinate, covered county. Further, the purpose of § 5 appears to be to target only those enactments by jurisdictions suspected of abridging the right to vote and not those put in force by a non-covered, superior jurisdiction.

J.S.App. 5. Plaintiffs' notice of appeal followed. J.S.App. 13.

STATEMENT OF MATERIAL FACTS

Under the Constitution and laws of California, the State has plenary power over its judicial system of trial and appellate courts. *See generally* Cal. Const., Art. VI, and § 5; Cal. Gov. Code, §§ 68070, et seq. [general administrative provisions]; 71001, et seq. [Municipal Courts]; 69502, et seq. [Superior Courts]; 69100, et seq. [Courts of Appeal]; and 68801, et seq. [Supreme Court]. *And see, e.g., County of Sonoma v. Workers' Comp. Appeals Bd.*, 222 Cal.App.3d 1133, 1137 and n. 1 (1990). The Legislature has specific authority to divide counties into municipal court districts (Cal. Const., Art. VI, § 5(a)), and to "provide for the organization and prescribe the jurisdiction of municipal courts." Cal. Const., Art. VI, § 5(c).

In addition, the Constitution establishes the State's Judicial Council, charged with monitoring the condition of judicial business statewide, making recommendations, and "perform[ing] other functions prescribed by statute." Cal. Const., Art. VI, § 6. *See also* Cal. Gov. Code, §§ 68500, et seq. One such statutory function is to recommend consolidation or enlargement of judicial districts, where appropriate, to promote administrative economies. Cal. Gov. Code, § 71042.

In 1972, pursuant to this authority, the Judicial Council evaluated the County's then-existing justice courts and municipal courts. The State's recommendation, reflected in a letter from the Chief Justice of California, was that these lower courts *should be merged into a single consolidated countywide municipal court* to advance important state policies:

> It is recommended by the Judicial Council that the lower courts in Monterey County be consolidated into a county-wide municipal court district with the new court sitting full time in Salinas and Monterey and holding sessions in King City as needed.

S.A. 1 (Appx. to State's Mot. to Affirm, p.1). The report suggested that justice court districts be consolidated "[w]henever a judicial vacancy occurs in a justice court." *Id.* at 2.[4] The County thereafter followed these recommendations in increments, as judicial vacancies occurred and opportunities to merge courts arose.[5]

In 1979, the State exercised its plenary power, amending California Government Code section 73560 to prescribe the configuration and the name of a single municipal court in Monterey County:

> There is in the County of Monterey, on and after the effective date of this section, a single municipal court district which embraces the former Salinas Judicial District, Monterey Peninsula Judicial District and North Monterey County Judicial District. This article applies to the

---

[4] This recommended consolidation was consistent with a marked statewide reduction in the number of inferior trial courts. *See Comment, Trial Court Consolidation in California*, 21 UCLA L.Rev. 1081 (1974). *See also, e.g., 1991 Annual Report of Judicial Council to Governor and Legislature*, p. 104, Table 5 (S.A. 27).

[5] *See Lopez*, 117 S.Ct. at 344: "Between 1972 and 1983, the County adopted six ordinances, which ultimately merged the seven justice court districts and two municipal court districts into a single, county-wide municipal court. . . . " *And see* Cal. Gov. Code, § 71040.

> municipal court established within the judicial district which shall be known as the Monterey County Municipal Court.

Cal. Stats. 1979, Ch. 694, § 1. *See also Lopez*, 117 S.Ct. at 344, n. *; Order, J.S.App. 6. In 1983, the State further amended its statutes to permit consolidation of the County's remaining two justice courts with this State-defined municipal court, authorizing an increase in the number of judges contingent upon such consolidation. *See* Cal. Gov. Code, § 73562; Cal. Stats. 1983, ch. 1249, § 3. The County responded by passing Ordinance No. 2930, resulting in a single countywide court. That 1983 change – including the County's ordinance – received administrative preclearance from USDOJ. Order, J.S.App. 7; *see also Lopez*, 117 S.Ct. at 345.[6]

In 1994, California's voters adopted Proposition 191, thereby amending their Constitution to abolish *all* justice courts throughout the State. Cal. Const., Art. VI, §§ 1, 5(b).[7]

---

[6] USDOJ concedes that it precleared Ordinance 2930, "the final consolidation in Monterey County." June 1998 Brief for U.S. as Amicus ("USDOJ Brief"), p. 27, n. 9. *See also* Jan. 30, 1997 U.S. Amicus Brief in Response to State's Motions, at p. 7, n. 5; May 1996 Brief for the U.S. as Amicus in the interim appeal, Case No. 95-1201, at p. 15, n. 10. *And see* March 1998 U.S. Amicus Brief in this appeal, at p. 3.

[7] Similarly, in the June 2, 1998 statewide Primary Election, California's voters adopted Proposition 220, which "permits superior and municipal courts within a county to consolidate their operations if approved by a majority of the superior court judges and a majority of municipal court judges in the county." *Existing municipal courts in such a county "would be abolished. . . ."* Cal. Primary Election Ballot Pamphlet, Analysis of Proposition 220, S.A. 39; emphasis added. Cal. Const., Art. VI, §§ 5(e), 6, 23.

SUMMARY OF ARGUMENT

Section 4 of the VRA provides specific, precise, and exclusive criteria, or coverage formulae, which identify those states or political subdivisions made subject to the severe "preclearance" penalty of Section 5. A governmental unit so identified is presumed to have engaged in past persistent, systematic, and ingenious voting discrimination; under Section 5, therefore, such a suspect unit may not "enact or seek to administer" new voting changes without first obtaining federal permission. If a covered jurisdiction devises and attempts to implement a voting change without preclearance, USDOJ or private parties may file an action, a "coverage case," in a 3-judge federal district court to enjoin the proposed change pending preclearance.

In the present coverage case, Plaintiffs have alleged that amendments to the statutes and Constitution of a non-covered governmental unit (the State of California) are ineffective and subject to preclearance solely because a political subdivision therein (Monterey County) was independently identified as a covered jurisdiction under the Act's coverage formulae. Prior to this case, as USDOJ acknowledges, no court had directly considered this question.[8]

---

[8] At the District Court's December 16, 1997, Hearing on Tentative Order, Mr. Cal G. Gonzales, counsel for USDOJ, explained: "[T]his case, and the argument raised here, are first impression. We know of no cases, or no argument out there, *there is no case law that explicitly discusses the issues that are confronted by this court."* Transcript at p. 37; emphasis added. *See also* March 1998 U.S. Brief at 19: "The Court has never addressed whether or how that 'lack of discretion' concept would apply to

The District Court's unanimous holding below – that Section 5 coverage extends only to the legislative and administrative acts of identified covered units (J.S.App. 4-5 and n. 1) – is dictated by the plain language and structure of the Act itself and promotes the Act's underlying purposes and policies. It is also consistent with this Court's decisions, with rules of statutory construction, with common sense, with principles of federalism, and with analyses of the Act set forth in the relevant House and Senate Reports accompanying the bills that, in 1965, became the VRA.

Appellants' proposed establishment of "partially covered jurisdictions," on the other hand, is nowhere articulated in the Act and flies in the face of the statute's clear and unambiguous language. It would extend the preclearance penalty far beyond the Act's targeted jurisdictions, and far beyond any predicate wrongdoing. Further, although Appellants' proposed construction would upset the normal balance of powers between the federal government and the sovereign States, Appellants cannot cite anything like the "clear and unmistakable" statutory expressions of congressional intent necessary before such a construction would be permitted; rather, the Act and its legislative history plainly reflect a contrary intent.

Accordingly, the District Court correctly concluded that enactments and executive decrees of a non-covered

---

a situation in which a covered political subdivision must administer voting changes under *state* law." Emphasis in original.

State, including those which currently dictate the countywide municipal court in Monterey County, are not subject to federal preclearance. The District Court's unanimous Orders and Judgment of Dismissal must therefore be affirmed.

ARGUMENT

I.

THE CURRENT COUNTYWIDE COURT IS DICTATED BY STATE LAW AND PRECLEARED ORDINANCE

By the time Appellants filed their Section 5 coverage action in late 1991, the targets of their challenge – historic consolidation ordinances adopted by the County between 1972 and 1983 – had become immaterial. Rather, as the District Court correctly found, *by 1991* Monterey's countywide municipal court was a product of intervening state law: "Superseding changes in California law have converted the County's judicial election scheme into a state plan. . . . " Order, J.S.App. 6. The superseding effect of state law was underscored in 1994, when justice courts – which constituted seven of the County's nine inferior courts in 1968 (*Lopez*, 117 S.Ct. at 343) – were altogether eliminated from the State's judicial system by constitutional amendment.[9]

---

[9] USDOJ has argued that, absent the 1983 consolidation, Proposition 191 would simply have changed existing justice courts into independent municipal courts (March 1998 U.S. Brief at 18, n. 8), but this claim overlooks the State's constitutional restrictions on the size and configuration of municipal courts. *See Lopez*, 117 S.Ct. at 344. Similarly, in now accusing the District

The Court's finding is solidly anchored in law and fact. As noted above, the California Constitution vests in the Legislature the power to divide counties into municipal court districts "as provided by statute" and to direct their organization. Cal. Const., Art. VI, §§ 5(a),(c); Order, J.S.App. 6. In 1979, the Legislature exercised this power by prescribing, in clear terms, a single municipal court for the County "on and after the effective date of this section. . . . " Cal. Gov. Code, § 73560; Cal. Stats. 1979, Ch. 694, § 1.

Prior to this 1979 State directive, to be sure, the County itself had passed various ordinances to merge and rename inferior courts, pursuant to authority delegated under California Government Code 71040, and had implemented these changes without federal preclearance. *See* Order, J.S.App. 2; *Lopez*, 117 S.Ct. at 344-345. But the Legislature's statutory establishment of a new municipal court in 1979 plainly superseded any prior alterations made by the County, rendering those changes, and any related preclearance issues, entirely moot. *See, e.g., City of Monroe, et al. v. United States*, ___ U.S. ___, 118 S.Ct. 400, 401-402 (1997) [local covered jurisdiction's obligation to preclear changes in local charter *ceases* after enactment of superseding and controlling statewide legislation]; *Young, et al. v. Fordice, et al.*, 520 U.S. 273, 117 S.Ct. 1228 (1997) [covered jurisdiction not required to seek preclearance of

---

Court of "misapprehending" the impact of Proposition 191 on Monterey County (USDOJ Brief at p. 27, n. 9), USDOJ overlooks the District Court's very careful and accurate use of the subjunctive mode in describing what surviving justice courts "would necessarily have become" after Proposition 191 *if they had not already been consolidated* in 1983. *See* J.S.App. 8.

change imposed by superior power, except to extent covered jurisdiction retains and exercises discretion in implementation].[10]

The Legislature's 1979 statutory amendment " '*repeal[ed] the existing provisions* relative to the municipal court in Monterey County *and enact[ed] new provisions establishing a single judicial district for the municipal court* in Monterey County. . . . ' " Order, J.S.App. 6, quoting official Digest (AB 628); emphasis added. *See also* J.S.App. 32. The supremacy of the State's later enactment is quite

---

[10] Appellants describe as "a key issue on this appeal" the question whether "County ordinances enacted prior to 1983 [received] federal preclearance." (Appellants' Merits Brief ["MB"] at 8.) But that is not an issue here at all, nor was it an issue in Appellants' earlier appeal. The District Court never found, nor does the State contend, that USDOJ's undisputed preclearance of Ordinance 2930 in 1983 served also to preclear earlier county ordinances. Neither did the District Court ever suggest that those prior ordinances, *when passed by the covered County*, were in any way "immune" or "exempt" (Appellants' words) from the preclearance requirement. Rather, the District Court's clear holding – consistent with this Court's opinions – is that preclearance issues and obligations concerning those earlier ordinances *were later rendered moot* in 1979, when a superior, non-covered jurisdiction (the State) repealed existing laws and enacted a superseding state law that controlled "on and after [its] effective date," leaving the County with no discretion and the prior ordinances with no effect. (J.S.App. 6-8; *and see Monroe*, 118 S.Ct. at 401-402; *Young*, 117 S.Ct. 1228.) As the coverage court found: "The [countywide] district was created by the 1979 [state] amendment to section 73560 and [by] County Ordinance 2930. However, the 1979 amendment did not need preclearance, and Ordinance 2930 was precleared." J.S.App. 8, n. 4.

clear.[11] Cal. Const., Art. VI, § 5 [Legislature's authority over municipal courts]; Art. XI, § 1(a) [counties are "legal subdivisions of the State"]; Art. XI, § 1(b) ["Legislature shall provide for county powers"]. *And see, e.g.*, Cal. Gov. Code § 71001 [prior laws relating to municipal courts remain in effect "until altered by the Legislature"]. "Any local law that directly conflicts with state legislation is void." *Galvan v. Superior Court*, 70 Cal.2d 851, 856 (1969); *accord, Building Industry Assn. v. City of Livermore*, 45 Cal.App.4th 719, 724 (1996); *Cedar Shake & Shingle Bur. v. City of Los Angeles*, 997 F.2d 620, 623 (9th Cir. 1993).[12]

---

[11] In repeatedly claiming that the State merely "ratified" or "incorporated" County policy choices here, Appellants utterly ignore the State Judicial Council's 1972 report, which unquestionably establishes that countywide consolidation of Monterey's inferior courts was *the State's* policy choice, in which the County acquiesced. S.A. 1-26; *and see* S.A. 27; J.S.App. 7. The State Legislature is manifestly not an instrumentality of or subordinate to the Board of Supervisors of a single county, and the State's 1979 amendment to Cal. Gov. Code § 73560 does not reference, much less "incorporate," any County ordinances. Further, it is patently absurd to suggest that, when the statewide electorate voted to adopt Proposition 191 in 1994 (thereby eliminating *all* justice courts throughout California), they did so merely to endorse or ratify the previous elimination of justice courts in Monterey County – whose population of 355,660 is less than 1.2 percent of the State's nearly 30 million total. *California Statistical Abstract 1995*, p. 19, Table B-5.

[12] The County agrees that Cal. Gov. Code § 73560, which now prescribes a single countywide municipal court district, "does not allow Monterey County to modify and consolidate municipal or justice court districts." County Ans. to Amended Comp., p. 3, ¶ 5. S.A. 30-31. The County also acknowledges that it "is a political subdivision of the State," and that State statutes "are binding and enforceable against [it]." *Id.* at p. 4, ¶ 15. S.A. 33.

In 1983, the Legislature further amended state law to permit the County to merge its two remaining justice courts into the municipal court. Cal. Gov. Code, § 73562; Cal. Stats. 1983, ch. 1249, § 3. Both the State's 1983 amendment and the County's corresponding 1983 consolidation ordinance received federal preclearance; hence, there are no remaining Section 5 issues associated with that final step in the unification process. *See* Order, J.S.App. 6-7; *and see* note 6, *ante*. Further, the subsequent elimination *by the State* of all justice courts in every county, through adoption of Proposition 191 in 1994, would have resulted in a countywide municipal court in Monterey County even in the absence of the County's 1983 ordinance. J.S.App. 8; Cal. Const., Art. VI, § 5. In either event, as the District Court correctly determined: "The County, as a subordinate jurisdiction of the State, lacks the discretion to choose a voting plan that does not involve a county-wide district." J.S.App. 9.

Thus, there is abundant support for the District Court's determinations that: (a) the countywide municipal court is presently, and was in 1991, a state plan, ordained by state law; and (b) to the extent that the County's 1983 consolidation ordinance changed the municipal court from its 1979 configuration to its present countywide status, that ordinance was precleared by USDOJ. These findings must be affirmed on appeal.

II.

THE STATE OF CALIFORNIA IS NOT A COVERED JURISDICTION

The State is not a designated covered jurisdiction; it has never been identified, under any coverage formula, as a covered "State or political subdivision" subject to Section 5's preclearance penalties. *See* 28 C.F.R., App. to Part 51. The District Court's decision is, in this respect, undisputed and unimpeachable. J.S.App. 5 and n. 1.

III.

THE ACT'S PLAIN LANGUAGE LIMITS APPLICATION OF THE PRECLEARANCE PENALTY TO STATUTORILY DESIGNATED STATES OR POLITICAL SUBDIVISIONS

A. Section 5 Expressly Incorporates The Act's Coverage Formulae

Congress has provided specific formulae in Section 4(b) to determine which governmental bodies are subject to the preclearance penalty. According to the Act's plain language, federal preclearance is required *only as to voting changes initiated by an identified covered jurisdiction* – i.e., a "State or political subdivision" designated by USDOJ and the Census Bureau as coming within the statutory coverage formulae. Section 5's opening sentence defines the reach of that preclearance requirement as follows:

> Whenever *a State or political subdivision . . . with respect to which the prohibitions set forth in section 1973b(a) [Section 4(a)] of this title based upon determinations made under the second sentence of section 1973b(b) [Section 4(b)] of this title are in effect* shall enact or seek to administer any [voting change] . . . *such State or subdivision* may institute an action . . . [for preclearance] . . . . : *Provided,* That such [voting change] . . . may be enforced without such proceeding if [it] . . . has been submitted by the . . . *State or political subdivision* to the Attorney General and the Attorney General has not interposed an objection. . . .

Emphasis added. It follows, of course, that *unless* a State or subdivision has been determined to be a covered jurisdiction under Section 4(b), or is a subordinate subdivision or "instrumentality" of such a covered jurisdiction,[13] it remains free to "enact" or to "seek to administer" voting changes without prior permission from USDOJ or the federal courts. *See* J.S.App. 4-5.

B. Individual Subdivisions Are Covered In The Disjunctive, As "Separate Units" From Their States

Other plain language in the Act further supports the District Court's holding in this respect. For example, throughout Sections 4 and 5, the Act consistently refers to coverage of a "State ***or*** political subdivision," in the disjunctive. As USDOJ argues in a different context, Congress' use of the disjunctive in this manner signifies an intent that the two terms be given different meanings; the District Court has done so here. *See Bailey v. United States,* 516 U.S. 137, 145-146 (1995). Appellants ignore this

---

[13] *See United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110 (1978) (*"Sheffield"*) and *City of Rome v. United States,* 446 U.S. 156 (1980), discussed *infra.*

distinction when they argue that coverage determinations as to a political subdivision should be construed as also reaching a State which, they concede, is otherwise "not covered."

The flaws in their argument are further revealed by the Act's express provision that the County, as a political subdivision, has been captured by the coverage formulae and made subject to the preclearance penalty only ***"as a separate unit."*** Sec. 4(a) (42 U.S.C. § 1973b(a)); emphasis added. Appellants ignore this statutory language as well. Yet their theory of construction – i.e., that the State, merely because it is a superior jurisdiction, must be deemed included in the political subdivision's coverage – is simply untenable in light of Congress' explicit limitation on such coverage.

The word "separate," as an adjective, means "[i]ndividual; distinct; particular; disconnected." *Black's Law Dictionary*, 1364 (6th Ed. 1990). The more extensive definition provided in *Random House Webster's Unabridged Dictionary*, 1746 (2d Ed. 1997) confirms this normal usage and common-sense understanding of the term:

> *-adj.* **13.** detached, disconnected, or disjoined. **14.** unconnected; distinct; unique: *two separate questions.* **15.** being or standing apart; distant or dispersed . . . **16.** existing or maintained independently: *separate organizations.* **17.** individual or particular: *each separate item.* **18.** not shared; individual or private: *separate checks; separate rooms.* **19.** (*sometimes cap.*) noting or pertaining to a church or other organization no longer associated with the original or parent organization.

If Congress' inclusion of the phrase "as a separate unit" is to be given any recognition or effect, it must be read to mean that the County is subject to preclearance only insofar as it exercises *independent* rulemaking power or administrative discretion. Conversely, the preclearance penalty plainly cannot apply when, as here, the actions of such a subdivision are not "separate" or "disconnected" or "standing apart," but rather are required, without discretion, by the dictates of a superior, non-covered "parent" jurisdiction.

C. There Are No "Partially Covered Jurisdictions"

The phrase "partially covered state(s)," or "partially covered jurisdiction(s)," or some variation thereof, appears more than 20 times in Appellants' Brief. The same terms are also sprinkled liberally throughout USDOJ's Amicus Brief. But this imagined Section 5 class of "somewhat suspect" or "slightly restrained" jurisdictions is purely their creation. No matter how often they repeat these phrases, the fact remains that *the VRA nowhere establishes such a hybrid*, and that nothing in the Act suggests that a governmental unit may be *partially* suspect or that the preclearance penalty will be *partially* imposed in some patchwork fashion. Rather, the Act simply and without ambiguity provides three categories of covered jurisdictions, as determined by the coverage formulae: (1) covered states; (2) derivatively, the political subdivisions of covered states; and (3) political subdivisions covered "as a separate unit." (Sec. 4(a).) Governmental units so designated by the Act's coverage

formulae are *entirely* covered: that is, any significant voting change initiated by these covered entities, whether administratively or legislatively, must be precleared before it can be implemented. (Sec. 5.) There is no parallel provision for "partial coverage" or for "partial preclearance," however; and if Appellants wish to expand statutory coverage by *adding* such a provision, of course, their pleas must be directed to Congress, not to this Court.

In light of the Act's specific formulae for determining which governmental units are subject to the preclearance penalty, and its clear listing of all coverage categories in the bailout provision, it is ludicrous to suggest that Congress intended to include – yet made absolutely no mention of – a different set of penalized governmental units. Appellants' peculiar proffered construction is forbidden by the basic maxim: *Expressio unius est exclusio alterius. Cf. Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 168 (1993).

D. The Phrase "Seek To Administer" Does Not Support Appellants' Theory

Appellants ignore Section 5's express incorporation of these specific coverage formulae, and instead focus solely on Congress' inclusion of the phrase "seek to administer," arguing that these three words can *only* refer to a subdivision's implementation of State-dictated programs. Otherwise, they contend, any distinction between the term "enact" and the term "seek to administer" would be "rendered meaningless" (MB 36), and the two terms would necessarily be "interchangeabl[e]," thereby

nullifying Congress' use of the disjunctive phrase "shall enact *or* seek to administer." (USDOJ Brief 17.) But this contention is readily refuted, and was properly rejected by the unanimous District Court.

The State agrees that "enact" and "seek to administer" have different meanings; that "enact" refers to the formal process of legislation, while "administer" generally refers to less formal, executive decision making. But Appellants take an unwarranted and monumental leap when they argue that this distinction must indicate that Congress intended to abandon or revise its formulae for identifying covered jurisdictions. An infinitely more reasonable construction – consistent with the remaining language of Section 5, with Section 4, with this Court's decisions, and with common sense – is that these terms continue to refer to voting changes initiated by identified covered jurisdictions, and have nothing to do with the sovereign acts of non-covered states.

Appellants' argument simply ignores the fundamental and obvious fact that governments – including covered States and covered local subdivisions – have at least two distinct functions or branches: executive and legislative. A suspect jurisdiction might effect voting changes through formal legislation or rulemaking ("enact") *or* through discretionary executive directives ("seek to administer").[14] Congress' use of both terms merely

---

[14] In California, for instance, county election officials (including those in covered counties) are vested with *administrative discretion* to make a wide variety of voting-related changes without any formal rulemaking process. *See, e.g.*, Cal. Elections Code, §§ 12220, et seq. [establishing election precinct

reflects the view that *a covered jurisdiction* may not initiate *either* kind of change without preclearance. *See, e.g., NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985) [preclearance requirement "reaches informal as well as formal changes"]. *See also Young*, 117 S.Ct. at 1236; *Foreman v. Dallas County, Tex.*, ___ U.S. ___, 117 S.Ct. 2357, 2358 (1997).[15]

Indeed, USDOJ's own regulations concerning Section 5 expressly acknowledge this very fact, i.e., that *a covered jurisdiction* might initiate voting changes through either rulemaking *or* through the exercise of local administrative discretion – an admission that utterly contradicts the strained and expansive construction of "seek to administer" which USDOJ proposes here. Thus, Section 51.27(g) of USDOJ's regulations (28 C.F.R. § 51.27(g)) requires that submissions for preclearance include:

> "(g) Identification of *the person or body* responsible for making the change and the mode of decision (e.g., act of State legislature, ordinance of city council, *administrative decision by registrar*)."

(Emphasis added. *And see* 28 C.F.R. § 51.27(c) [requiring explanatory statement if "the change affecting voting

---

boundaries]; 12260, et seq. [changing precinct boundaries]; 12280, et seq. [designating and changing polling places]; 12304, et seq. [determining composition of precinct boards]; 12306, et seq. [appointing election officials]. Without the phrase "seek to administer" in Section 5, the preclearance penalty would not extend to these kinds of administrative acts by a covered unit.

[15] Appellants also describe a situation in which the phrase "seek to administer" would embrace prior *legislative* acts initiated by a covered jurisdiction: namely, whenever a covered unit attempts, in later elections, to apply *its own* past regulations that have not been precleared. (MB 45)

either is not readily apparent on the face of the documents provided . . . *or is not embodied in a document* . . ."]; emphasis added.)

If Congress had not included both terms, then a host of voting changes might have escaped the preclearance penalty merely because they did not flow from formal legislative enactments.[16] *See, e.g., Morse v. Republican Party of Virginia*, 517 U.S. 186, 116 S.Ct. 1186 (1996) [political party imposing registration fee]; *Perkins v. Matthews*, 400 U.S. 379 (1971) [changing locations of polling places].

---

[16] As Appellants admit, an earlier version of Section 5 (then, Section 8 of S. 1564) addressed only formal legislative acts. (MB 18.) The opening clause of Section 8 then provided:

> Whenever a [covered] State or political subdivision shall enact *any law or ordinance imposing qualifications or procedures* . . .

Cong. Rec., Vol. 111, 89th Cong., 1st Sess. ("CR"), 28358; emphasis added. *And see, e.g.*, U.S. Code Cong. & Admin. News (1965) at 2525. In this version, Section 8 thus concerned only

> the *future enactment* of voter qualifications, etc., by States or subdivisions which failed to have 50 percent of their population registered or voting . . .

(CR 28359, Summary Analysis.) Covered jurisdictions would have been free to initiate voting changes *by administrative decree*, however – a possibility later foreclosed when the Senate substituted the phrase "or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" for the Section 8 phrase italicized above. (CR 28360) As explained in Senate Report No. 162, this revised language governed "attempts by . . . [covered jurisdictions] to alter *by statute or administrative acts* voting qualifications . . . " S. Rep. No. 162, p. 24, 89th Cong., 1st Sess., *reprinted in* U.S.C.C.A.N. p. 2562 (1965); emphasis added.

Thus, under the District Court's construction, the term "seeks to administer" plays a critical substantive role in more broadly describing changes *initiated by a covered jurisdiction*; it is neither "interchangeable" with the term "enact" nor is it "superfluous."[17]

The District Court's analysis finds powerful support in several of this Court's decisions. In *Young*, 117 S.Ct. at 1236, this Court described "administrative practices" as "practices that are not purely ministerial, but *reflect the exercise of policy choice and discretion* by [the covered jurisdiction's] officials." Emphasis added. *See also Foreman*, 117 S.Ct. at 2357 [although covered state's statute was precleared, county's exercise of discretion thereunder must also be precleared]; *NAACP v. Hampton County*, 470 U.S. at 178. Indeed, *Young's* holding – that a covered jurisdiction is not required to preclear voting changes imposed by superior powers unless local discretion is retained and exercised – appears fully to answer the question presented in this appeal. *City of Monroe*, 118 S.Ct. 400, also strongly supports the judgment below. There, a covered local jurisdiction was no longer required to seek preclearance of prior changes in its local charter

---

[17] Congress' very use of the words "seek to administer," rather than simply "administer," further compels the conclusion that the covered jurisdiction *must have some choice or discretion* in initiating the administrative change before preclearance is required. *See Random House Webster's Unabridged Dictionary*, 1733 (2d Ed. 1997) [defining the verb "seek" as "**1.** to go in search or quest of: *to seek the truth*. **2.** to try to find or discover by searching or questioning: *to seek the solution to a problem*"]. Manifestly, such discretion does not exist, and no such "search" is required, when, as here, the change is *dictated* by a superior jurisdiction.

because those changes were superseded by controlling statewide legislation.[18]

In his dissenting opinion in *Beer v. United States*, 425 U.S. 130, 151-152 (1976), Justice Marshall (joined by Justice Brennan) stressed that the focus of Section 5's preclearance penalty is enactments and decrees of covered jurisdictions:

> Thus, the legislative history of the Voting Rights Act makes clear . . . that § 5 was designed to preclude new districting plans "that perpetuate discrimination," to *prevent covered jurisdictions from "circumventing the guarantees of the 15th amendment" by switching to new, and discriminatory, districting plans* the moment litigants appear on the verge of having an existing one declared unconstitutional, and promptly to end discrimination in voting by *pressuring covered jurisdictions to remove all vestiges of discrimination from their enactments before submitting them for preclearance*. [Footnotes omitted.]

(Emphasis added.)

As these cases show, the preclearance penalty applies exclusively to actions which originate in covered governmental bodies. If a local covered jurisdiction did *not* initiate or direct a particular condition and is powerless

---

[18] *Perkins v. Matthews*, 400 U.S. at 394-395, is also entirely consistent with the District Court's decision here. In *Perkins*, the local jurisdiction *chose to disregard* a 1962 (pre-coverage) state law requiring at-large elections, and instead conducted elections by ward in 1965. Accordingly, that local jurisdiction's later change to at-large elections, in 1969, was found to be in the nature of a *local discretionary post-coverage change* rather than a state-imposed pre-Act change.

to modify it, then the only question is whether (a) the superior jurisdiction imposing the condition is itself a covered jurisdiction (*e.g., City of Monroe*), in which case that superior jurisdiction must obtain preclearance, or (b) the superior jurisdiction is not covered (*e.g., Young*), in which case preclearance is unnecessary.

Finally, and quite significantly, the District Court's unanimous construction of Section 5 is *precisely the construction given to that provision by Congress itself.* In its 1965 House Report accompanying the bill (H.R. 6400) and recommending passage, as amended, the House Judiciary Committee explained the purpose of Section 5 as follows:

> **Section 5**
>
> This section deals with *attempts by a State or political subdivision with respect to which the prohibitions of section 4 are in effect to alter by statute or administrative acts* voting qualifications and procedures . . .

H. Rep. No. 439, 89th Cong., 1st Sess., "Analysis of the Bill," U.S. Code Cong. & Admin. News, pp. 2457-2458 (1965); emphasis added. Exactly the same understanding of Section 5 was expressed, *verbatim*, in the Senate Report accompanying the Senate version of the bill (S. 1564), in a joint statement by 12 Members of the Senate Judiciary Committee, including the bill's manager (Sen. Hart), the minority leader (Sen. Dirksen), and several prominent sponsors of the bill. (Sens. Dodd, Long, Kennedy, Bayh, Burdick, Tydings, Hruska, Fong, Scott, and Javits.) *See* S. Rep. No. 162, p. 24, 89th Cong., 1st Sess., Joint Views of 12 Members of the Judiciary Committee Relating to the Voting Rights Act of 1965, "Analysis of the Bill," U.S. Code Cong. & Admin. News, p. 2562 (1965). These

reports leave no doubt that Section 5's preclearance penalty extends only to *attempts by covered jurisdictions* to alter voting practices; the acts of non-covered jurisdictions are unaffected. (*And see* remarks of Sen. Hart, quoted *infra* at note 33.)[19] Appellants' contrary claim – that preclearance should extend "to all voting changes irrespective of their legislative origin" (MB 37, n. 22; USDOJ Brief, 15-16) – has no foundation in the Act, its legislative history, or its underlying purpose.

---

[19] *See also* H. Rep. No. 94-196, 94th Cong., 1st Sess., at p. 58 (1975), wherein the following explanation of Section 5 confirms that preclearance is required for changes "desired" and "adopted" by a covered jurisdiction, not those imposed upon it by superior jurisdictions:

> Section 5 is a stringent remedy. By, in effect, presuming that changes affecting voting *which are adopted by a covered jurisdiction* are a violation of the statutory standard, it treats all changes as unenforceable. Perhaps, it would be more accurate to say that section 5 imposes a new legislative procedure *upon a covered jurisdiction desiring to make a change affecting voting*: in addition to whatever steps are made necessary by State or *local law* for a proposed change to become law, section 5 requires federal approval.

(Emphasis added.)

IV.

APPELLANTS' PROPOSAL LACKS THE NECESSARY CLEAR AND UNMISTAKABLE STATUTORY LANGUAGE

In urging a construction of Section 5 that would restrain non-covered States, Appellants attempt to shoulder an extremely imposing burden: a burden which they have no hope of bearing. As this Court has often observed, courts may not interpret a federal statute to reduce the States' sovereign powers unless Congress has included "unmistakably clear" language to that effect in the statute itself. Courts are flatly prohibited from *assuming* or *inferring* any such intent by Congress:

> [I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 [1985] . . . ; *see also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 [1984] . . . Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 [1947]. . . .

Gregory v. Ashcroft, 501 U.S. 452, 460-461 (1991), quoting from *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989); *New York v. United States*, 505 U.S. 144, 170 (1992). *And see Reno v. Bossier Parish School Board, et al.* ("*Bossier Parish*"), 520 U.S. 471, 117 S.Ct. 1491, 1500 (1997) [Court will not assume that Congress would "impose a demonstrably greater burden on the jurisdictions covered by § 5" without clear statement of intent and/or specific amendment to statute]. The purpose of requiring absolute

clarity in statutory language is to guarantee that Congress fully and carefully considered its intrusion into the States' domain, and appreciated the critical ramifications thereof upon interests of federalism:

> In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. [Citations omitted.]

Gregory, at 461. Here, as their contrived and contorted reading of the phrase "seek to administer" suggests, Appellants cannot point to *any* congressional amendment or clear statutory statement that supports their theory.[20]

---

[20] Neither can Appellants provide any non-statutory statements manifesting a clear and unmistakable intention to impose the preclearance penalty upon non-covered States. The only "evidence" Appellants proffered to the District Court of "congressional intent" was a single statement *by a partisan spokesman*, "Mr. Suitts," during a single day of Senate subcommittee hearings in February 1982, in response to a single question by Senator Hatch, who openly doubted whether a non-covered State's enactments could accurately be included in a tabulation of legislation deemed subject to preclearance. J.S. 17-18. *The witness conceded that he knew of no Supreme Court case holding that non-covered states are subject to the preclearance requirement and that he knew of no case in which that issue had been argued.* Hrgs. by Senate Subcomm. of Comm. on Judiciary, 97th Cong., 2nd Sess., Vol. 1, p. 599 (1983); emphasis added. His testimony was later briefly summarized in a Senate Report. *See* Sen. Rep. No. 97-417, 97th Cong., 2d Sess., at p. 12, n. 32 (May 25, 1982).

Although Appellants portray footnote 32 in a 239-page report as a "clear directive" from Congress, it is nothing of the sort. A careful reading of the footnote in context reveals that it is

simply an addendum to the summary of *Mr. Suitts' views*, explaining the *data compiled by his organization*. And even if that single footnote sentence could, arguendo, fairly be attributed to the Committee rather than a partisan witness, this Court has expressly held, in *Bossier Parish*, 117 S.Ct. at 1500, that such obscure references cannot remotely satisfy the requirement that Congress, if it wishes to "impose a demonstrably greater burden" on States, must do so in a clear statement and/or specific amendment. In any event, the footnote would plainly be insufficient to overcome earlier (and clearer) expressions of contrary intent by the 1965 Congress. *E.g.*, *Central Bank v. First Interstate Bank*, 511 U.S. 164, 185-186 (1994) ["the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discovering the meaning of that statute [citations omitted]"].

A review of matters that *were* discussed in the extensive 1982 hearings and debates surrounding the VRA, and in the 239-page Senate Report, underscores this conclusion. *See, e.g.*, Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Washington and Lee L. Rev. 1347 (1983). For example, members of Congress repeatedly alluded to this Court's analysis in *Katzenbach* and voiced concern that more restrictive "bailout" requirements for covered jurisdictions might render Section 5 unconstitutional. They also discussed at length the question whether to expand the Act's definition of covered jurisdictions. *E.g.*, Boyd & Markman at 1372-1374, 1380-1381, 1385, 1407-1409, 1420. In view of Congress' detailed attention to the scope of Section 5 coverage and to the availability of "bailout," Appellants' citation to Mr. Suitts' single obscure and defensive comment demonstrates an *utter absence* of congressional intent to broaden the preclearance penalty to restrict non-covered States.

V.

BECAUSE IT SEVERELY INTRUDES UPON SOVEREIGN RIGHTS, THE PRECLEARANCE PENALTY MUST BE NARROWLY CONSTRUED

The District Court's conclusion, that Section 5 targets "only those enactments by jurisdictions suspected of abridging the right to vote and not those put in force by a non-covered, superior jurisdiction," is also consistent with, if not compelled by, this Court's decisions in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) and *Briscoe v. Bell*, 432 U.S. 404 (1977), wherein preclearance was challenged *by two covered States* as an unconstitutional usurpation of powers reserved to the States. There, the Court recognized that the preclearance requirement – which, in effect, "automatically suspends the operation of voting regulations enacted [by covered jurisdictions]" (*Katzenbach*, 383 U.S. at 335) – was an extraordinary congressional remedy that exacted severe and unprecedented "federalism costs." *See Miller v. Johnson*, 115 S.Ct. at 2493; *Katzenbach*, 383 U.S. at 358-362 [Black, J. concurring and dissenting]; *Georgia v. United States*, 411 U.S. 526, 545 and n. * (1973) [Powell, J., dissenting]. This extreme penalty was nevertheless deemed permissible for two principal reasons.

First, the Court was satisfied that Congress had carefully crafted its initial *coverage formula* to capture only those "perpetrators of evil" known by Congress to have engaged in "widespread and persistent discrimination in voting" through "obstructionist tactics" and "systematic resistance to the Fifteenth Amendment." *Katzenbach*, 383 U.S. at 328. The Court repeatedly emphasized that Congress' original Section 4(b) formula was intentionally

designed to ensnare only known persistent wrongdoers, and determined that "Congress was therefore entitled to infer a significant danger of the evil *in the few remaining States and political subdivisions covered by § 4(b) of the Act.*" *Id.* at 329; emphasis added. *And see Briscoe*, 432 U.S. at 414; A. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights*, pp. 17, 21-22, 39, 180 (1987) ("Thernstrom").

Second, the Court emphasized that any innocent governmental unit wrongly *caught within the coverage formula, and thereby made subject to preclearance*, could readily extricate itself from the Section 5 penalty through Section 4(a) of the Act (42 U.S.C. § 1973b(a)) – the "bailout" provision – which imposed a "quite bearable" burden of proof upon such States or subdivisions. *Katzenbach*, at 332; *and see Briscoe*, 432 U.S. at 412 and n. 11.[21]

---

[21] As noted *ante*, the Act's "bailout" provision, too, strongly supports the District Court's reasoning here. Under Section 4(a), jurisdictions subject to preclearance may seek a declaratory judgment that preclearance is no longer necessary. Section 4(a) describes those entities upon which the preclearance penalty is imposed (and which may, therefore, seek "bailout") as falling in three, and *only* three, categories: (1) "any State with respect to which the determinations [inclusion within coverage formulae] have been made . . . "; (2) "any political subdivision of such [covered] State . . . , though such determinations were not made with respect to such subdivision as a separate unit . . . " [the *Sheffield* situation]; and (3) "any political subdivision with respect to which such determinations have been made *as a separate unit* . . . " (Emphasis added.) No mention is made of the fourth category urged by Appellants – i.e., "any State containing one or more covered subdivisions, though no [coverage] determination has been made as to such State," – because coverage of such presumptively innocent States was not contemplated.

More recently, this Court has suggested that Section 5's preclearance punishment may be unjustified in some circumstances. *See Miller*, 115 S.Ct. at 2493. *And see Bossier Parish*, 117 S.Ct. at 1498 [noting "the serious federalism costs already implicated by § 5"]. If principles of federalism lead the Court to question application of the preclearance penalty *to covered jurisdictions*, then the penalty can have no constitutional application whatsoever *to governmental units which, like California, were never identified as suspect under the Act's coverage formulae in the first place.* Any attempt to require such presumptively innocent sovereign governmental units "to entreat federal authorities in faraway places for approval of local laws before they can become effective" (*Katzenbach*, 383 U.S. at 359, Black, J. concurring and dissenting) would be an unwarranted and impermissible intrusion into the States' sovereign domain. *See also, e.g., City of Rome*, 446 U.S. at 202 [Powell, J., dissenting] ["preclearance, like any remedial device, can be imposed only in response to some harm"].[22] The constitutional problems with such an intrusion would be even more glaring because, as USDOJ has noted, *non-covered States have no "bailout" relief available to them.* (*See* note 21, *ante*.)

---

[22] *See also* Thernstrom, at 40 ("Had the original act in 1965 been less precise in its aim, had it upset the normal balance in federal-state relations in both North and South, it would not have stood up to constitutional scrutiny.") *Cf. Perkins v. Matthews*, 400 U.S. at 406-407, Black, J., dissenting: "Except as applied to a few Southern States in a renewed spirit of Reconstruction, the people of this country would never stand for such a perversion of the separation of authority between state and federal governments."

Non-covered jurisdictions may be sued under Section 2 (42 U.S.C. § 1973), of course, or under the Constitution; but Section 5 has no application.[23]

VI.

APPELLANTS' PROPOSED EXPANSION OF SECTION 5 COVERAGE FINDS NO SUPPORT IN DECISIONAL LAW

Appellants present no case law that directly supports their claim. The central notion underlying their appeal – namely, that federal preclearance requirements should be extended far beyond the Act's coverage provisions to encompass legislative enactments and administrative decrees of non-covered States – has never been addressed, much less adopted, by this Court. Rather, as USDOJ concedes, the argument raises an issue of "first impression," and (apart from the unanimous decision below) "there is no case law that explicitly discusses the issues. . . . " (*See* note 8, *ante*.) Appellants therefore resort to cases in which the issue was *not* raised or discussed,

---

[23] Appellants decry the "serious loophole" they say would result from affirming the District Court, but their claim is both circular and specious. Non-covered States plainly did not fall within "the protections of Section 5" in the first place. Any "loophole" was created not by the District Court but *by Congress*, which penalized only those states or political subdivisions whose status as "presumptive wrongdoers" is established by the Act's coverage formulae.

Equally specious, and even more baffling, is Appellants' strange argument that, because Congress "failed" to amend its coverage formulae –to somehow further "exempt" non-covered States from coverage, courts must therefore conclude that such non-covered States were intended to be covered! (MB 19-20.)

and they ask this Court to *infer from the courts' silence* that there were *implied* precedential rulings therein that bolster Appellants' theory. M.B. 30-32. *And see, e.g., Shaw v. Hunt*, 517 U.S. 899, 116 S.Ct. 1894 (1996) (*"Shaw II"*); *United Jewish Organizations, etc. v. Carey*, 430 U.S. 144 (1977) (*"UJO"*). In *Shaw II*, as Appellants have admitted, "the jurisdictional issue was not addressed directly. . . . " J.S. 11.[24] And the *UJO* language cited by Appellants as "analysis" is simply a recitation of procedural history, not an appraisal of the scope of Section 5's preclearance penalty.[25]

---

[24] Neither was the jurisdictional issue addressed in *"Shaw I." Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816 (1993). Rather, the Court merely observed that North Carolina had voluntarily submitted its redistricting plan for preclearance. *Id.* at 2820. Discussions of jurisdiction are also absent in the District Court cases cited by USDOJ: *United States v. Onslow County (N.C.)*, 683 F.Supp. 1021, 1023 (E.D.N.C. 1988) ["In this case there is no dispute that the changes at issue are covered by Section 5 and that approval has not been obtained."]; *Haith v. Martin*, 618 F.Supp. 410, 412 (E.D.N.C. 1985) [Defendants argue only that the changes were already precleared and that Section 5 does not apply to elections of judges].

[25] In describing the procedural history of *UJO*, the Court may appear to have suggested that non-covered States must submit their plans for preclearance:

> Litigation to secure exemption from the Act was unsuccessful, and it became necessary for New York to secure the approval of the Attorney General or of the United States District Court for the District of Columbia for its 1972 reapportionment statute insofar as that statute concerned Kings, New York, and Bronx Counties.

UJO, at 148-149; *and see id.* at 156-157. However, closer examination reveals that in *UJO*, as in the *Shaw* cases, the State

It is well settled, however, that such non-resolutions do not serve as precedent. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) [where issue never squarely addressed before, and at most has been assumed, Court is free to address and decide it]; *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 119 [" '[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.' " (Quoting from *Hagans v. Lavine*, 415 U.S. 528, 533, n. 5 (1974))]; *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 and n. 9 (1952).[26]

---

had voluntarily submitted to Section 5 scrutiny, and the issue whether Section 5 could be stretched beyond covered units was not raised or litigated, or even discussed, in that proceeding. *See also United Jewish Org. of Williamsburgh v. Wilson*, 510 F.2d 512 (2d Cir. 1975). Rather, once New York's "bailout" request was denied, the *UJO* Court – without addressing or deciding the validity of New York's *voluntary* submission to Section 5 coverage – merely explained the logical consequences thereof.

[26] *Brown Shoe Co. v. United States*, 370 U.S. 294, 306-307 (1962), cited by Appellants, is not to the contrary. There, in addressing the Supreme Court's appellate jurisdiction under the Expediting Act, this Court observed that the jurisdictional issue (finality of the district court's orders) *had previously been expressly raised and resolved*, though "[o]n but few occasions. . . . " With respect to prior cases in which the jurisdictional question had been "passed over without comment," however, the Court noted that "we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*. . . . " (citing *U.S. v. L.A. Tucker Truck*).

The case of *Sheffield*, 435 U.S. 110, likewise provides no help to Appellants. *See* J.S.App. 5, n. 1. *Sheffield* turned on a quite different principle: that, when a *State* has been designated as a covered jurisdiction, then the cities and other *subordinate political subunits subject to the control of that covered State* are also deemed covered, as "instrumentalities" of a covered jurisdiction. That principle is also at the core of two cases cited by USDOJ, each of which involved a covered State. *See Dougherty County (Ga.) Bd. of Educ. v. White*, 439 U.S. 32, 46 (1978) ["Congress intended all electoral changes *by political entities in covered jurisdictions* to trigger federal scrutiny" (emphasis added)]; *NAACP v. Hampton County (S.C.) Election Comm'n*, 470 U.S. at 178 [Section 5 reaches even minor informal administrative changes initiated by county officials in covered State]. *And see City of Rome*, 446 U.S. 156 [where city's coverage derives from State's coverage, city may not take advantage of "bailout" provision unless entire covered State qualifies for "bailout"]. *See also* USDOJ Brief, 14-20.[27]

Here, in contrast, the State is plainly not a "subdivision" or "instrumentality" of, or "subordinate to," the covered County; rather, it is a superior jurisdiction,

---

[27] Appellants' reliance upon the decisions in *Gaston County, North Carolina v. United States*, 395 U.S. 285 (1969) and *Apache County v. United States*, 256 F.Supp. 903 (D.C. 1966) is similarly misplaced. Those decisions did not turn on resolution of the scope of the preclearance penalty, and neither case even involved Section 5. Rather, they concerned the Act's automatic suspension of literacy tests.

whose laws now establish the countywide municipal court in Monterey County.[28]

VII.

USDOJ REGULATIONS CANNOT EXPAND THE STATUTORY REACH OF THE PRECLEARANCE PENALTY

The District Court correctly rejected Appellants' further claim that USDOJ regulations (specifically, 28 C.F.R. §§ 51.1(a) and 51.23(a)) somehow operate to bring non-covered jurisdictions within the scope of Section 5's preclearance penalty. J.S.App. 5, n. 1; *and see* MB 33-36. To the extent that these regulations may purport to expand the penalty, they defy Congress' specific coverage provisions; they undermine the sovereignty of non-targeted

---

[28] Appellants also cite this Court's observation in *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-567 (1969) that Congress intended Section 5 to reach "any state enactment which altered the election law of a covered State in even a minor way." (MB at 10.) The State does not dispute that Section 5's preclearance penalty has been broadly interpreted to encompass a wide variety of voting changes, whether introduced legislatively or by administrative decree. But *Allen* involved changes *initiated by two covered states* – Mississippi and Virginia – and the Court's comments plainly address only whether Section 5 permits *such covered states* to initiate "minor" voting changes without preclearance. *Allen* is perfectly consistent with the District Court's unanimous conclusion here, and lends nothing to Appellants' assertion that the preclearance penalty should be extended to enactments and administrative decrees of *non-covered states*. If *Allen* had concerned a covered subdivision ("as a separate unit") rather than covered states, the Court presumably would have described Section 5 as reaching "any *political subdivision* enactment which altered the election law of a covered *political subdivision* in even a minor way."

states; they far exceed USDOJ's authority; and they are entitled to no deference whatsoever.[29] Nor are unauthorized USDOJ regulations redeemed or given more weight merely because they were promulgated long before, or were followed in the past. *See, e.g., Bossier Parish*, 117 S.Ct. 1491 [Court invalidates regulation (28 C.F.R. section 51.55(b)(2)) long followed by USDOJ in evaluating preclearance submissions]; *New York v. United States*, 505 U.S. at 181-183 [state officials cannot consent to or ratify diminution of State's sovereignty; State's prior acquiescence in federal program does not estop it from asserting unconstitutionality thereof].

Appellants' recitation of the principle that "ambiguities" in the scope of Section 5 coverage "must be resolved against the submitting jurisdiction" (*see* J.S. 20-21) is, of course, inapposite here. That convention *presupposes* that the "submitting jurisdiction" is a covered State or a covered subdivision, and is employed only to resolve *what kinds* of voting changes initiated by such a body require preclearance. *See, e.g., NAACP v. Hampton County*, 470 U.S. at 178-179. In addressing the very different threshold issue of whether a particular governing

---

[29] No deference is accorded to USDOJ regulations or interpretations not authorized by the Act and/or violative of the U.S. Constitution. *See, e.g., Bossier Parish*, 117 S.Ct. 1491 [USDOJ regulation ignores Congress' clear distinction between Section 2 and Section 5]; *Miller v. Johnson*, 115 S.Ct. 2475 (1995) [USDOJ preclearance standards promote discrimination, racial stereotyping, and unconstitutional race-based districting]; *Shaw II*, 116 S.Ct. 1894 [same]; *Bush v. Vera*, 517 U.S. 952, 116 S.Ct. 1941 (1996) [same]; *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508 (1992) [USDOJ ignores limitation of preclearance penalty to voting changes].

body must submit *any* of its enactments and administrative decrees for preclearance, the Act includes specific formulae to identify and list the covered bodies, leaving no room for ambiguity. If there were ambiguity, furthermore, this Court has made it abundantly clear, in *Will*, in *Gregory*, in *New York*, in *Katzenbach*, and in *Miller*, that such ambiguity must be resolved in favor of the sovereignty of the States.

VIII.

APPELLANTS' RESORT TO SELECTIVE EXCERPTS FROM FLOOR DEBATES IS UNAVAILING

Much of Appellants' Brief is devoted to new arguments and citations concerning the legislative history of the VRA. Because these matters – principally, excerpts from the extensive floor debates and floor speeches in 1965 and suggested inferences therefrom (*see* MB at 13-26)[30] – were not previously raised, however, the District Court had no opportunity to consider or address them, and they are therefore not properly before this Court.[31] *See, e.g., Pennsylvania Department of Corrections v.*

---

[30] Appellants did draw the District Court's attention to 1982 testimony of partisan witness Steve Suitts, to the summary of that testimony in a footnote to a 1982 Senate Report, and to Senator Hatch's apparent surprise and open skepticism when informed that Suitts' organization had included enactments of a non-covered state in its list of changes that, in Suitts' view, should have been precleared but were not. Reference to these materials is made in Appellants' Brief as well (MB at 27-28), and the State has addressed them at note 20, *ante*.

[31] To its credit, USDOJ places no reliance on the floor comments excerpted by Appellants.

Yeskey, ___ U.S. ___, 118 S.Ct. 1952, 1956 (1998); *Dothard v. Rawlinson*, 433 U.S. 321, 323, n. 1 (1977).

Even if Appellants were permitted to advance these new arguments, moreover, they would be unavailing for the following several reasons.

First, absent ambiguity, the Court's inquiry into the scope of the preclearance penalty must begin and end with the statutory language itself; no weight is accorded to legislative history of any kind when, as here, that statutory language is plain and unambiguous. (*See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 147-148 and n. 18 (1994) [Court does not "resort to legislative history to cloud a statutory text that is clear"]; *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) [when words of statute are unambiguous, "court's inquiry is complete"].) In Sections 4 and 5 of the VRA, Congress has provided a specific, virtually mechanical definition of those governmental units subject to the preclearance penalty – i.e., those presumptively suspect units whose legislative authority and administrative discretion with respect to voting are severely diminished by the "prior restraint" requirement to obtain federal authorization. From these same provisions, it is likewise clear that the preclearance penalty has no application to governmental units which are *not* captured within Congress' precise coverage formulae. (*See* Arg. III, *ante*.)

Second, Appellants' belated citations to legislative history – and particularly to floor comments by individual legislators or witnesses in the context of extensive hearings (*see Allen*, 393 U.S. at 569 n. 33) – would be entitled to no weight or consideration in the present

–

context because Appellants are urging an expanded interpretation of the Act which, if adopted, would manifestly diminish the sovereign powers and prerogatives of non-covered States and would radically alter the "usual constitutional balance between the States and the Federal Government." As noted elsewhere in the State's brief, courts may not interpret any statute in this proposed manner unless Congress has made " . . . its intention to do so 'unmistakably clear in the language of the statute.' " *Gregory*, 501 U.S. at 460-461, quoting from *Will*, 491 U.S. at 65; *see also New York*, 505 U.S. at 170. The clear statutory language here, because it supports the District Court, stands as a complete and absolute bar to Appellants' proffered construction. (*See* Arg. IV, *ante*.)

Third, the interpretation of legislative history advocated by Appellants would run afoul of another basic rule of statutory construction: namely, that even if the Act were, arguendo, susceptible of two different interpretations, courts must construe the statute to avoid "grave and doubtful constitutional questions." (*United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).) For California and other non-covered states that have engaged in no predicate wrongdoing – even under the presumptive criteria reflected in the Act's coverage formulae – and that lack any "bailout" option, imposition of the drastic preclearance penalty would plainly and impermissibly betray the principles of federalism and of fairness embodied in the Constitution. *See Miller v. Johnson*, 115 S.Ct. at 2493; *Katzenbach*, 383 U.S. at 358-362 [Black, J. concurring and dissenting]. *And see Bossier Parish*, 117 S.Ct. at 1498. (*See* Arg. V, *ante*.)

Fourth, the excerpts of floor speeches cited by Appellants are, by their nature, especially unpersuasive – particularly where the speakers' purpose, acting in unison with representatives of other southern states, was to accentuate the problems and intrusiveness of preclearance in an effort to eliminate Section 5, in its entirety, from the bill.[32] *See, e.g., Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951) [fears and doubts expressed by opponents "are no authoritative guide to the construction of legislation"]; *Bath Iron Works v. Director, OWCP*, 506 U.S. 153, 166 (1993) [Court gives no weight to single reference by single Senator during floor debate]. *And see National Endowment for the Arts v. Finley*, ___ U.S. ___, 118 S.Ct. 2168, 2182 (1998), concurring opn. of Scalia, J. The unreliability of such statements is even greater where, as here, they are culled from a massive record reflecting "legislative hearings and debate . . . so voluminous [that] no single statement or excerpt of testimony can be conclusive," *Allen*, 393 U.S. at 569, and n. 33, and where they directly contradict not only the plain

---

[32] There is no validity to Appellants' suggestion, at MB 21, that Senator Ervin's proffered Amendment No. 135 sought only "to exclude the State of North Carolina from submitting for Section 5 review those state laws affecting the 34 counties." Rather, Amendment No. 135 proposed to "strike out sections 4 and 5 *in their entirety*," thereby eliminating preclearance requirements for all covered states and for all separately covered subdivisions. (CR 9772; emphasis added. *And see* CR 9794 [remarks of Sen. Hart].) Senator Ervin understood that Section 4's coverage formulae created an inference that "certain cities and counties in North Carolina," not the State of North Carolina, " . . . are engaged in violating the 15th amendment." (CR 9786.)

language of the Act and the views of other prominent individuals[33], but also the interpretation announced in the House and Senate Reports (*see* Arg. III, *ante*) and even the *current* interpretation of USDOJ.[34] *See, also, e.g., Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950) [citations to excerpts from hearings provide no help where "[t]he legislative history is more conflicting than the text is ambiguous"].) Some speakers quoted by Appellants

---

[33] For example, in response to Senator Ellender's statement that the State of North Carolina was covered, Senate Majority Leader Mansfield emphasized that it was not: "Not as a State, again, only certain counties of North Carolina are covered by the bill [S 1564]." (CR 8297.) And in responding to critics of Section 5, Senator Hart, the manager of S 1564, stated with perfect clarity that the preclearance requirement "deals with attempts *by a [covered] State or political subdivision* . . . to alter voting qualifications and procedures . . . " (CR 8302; emphasis added.) Senator Hart further explained that, even if the Attorney General interposes an objection, "the State or county may still enforce *its new voting law* if it secures a declaratory judgment . . . " (CR 8303; emphasis added.)

[34] Appellants rely on rhetorical statements by Senators Ervin and Stennis and Congressman Kornegay for the proposition that statutes enacted by the state legislature of North Carolina, a non-covered State, would be a "nullity" and could have no effect unless the State first obtained preclearance. (MB 15, 17-18, 23, 25-26.) But USDOJ's approach to "partially covered States" holds that "the States themselves are not required to make preclearance submissions on behalf of either themselves or their covered political subdivisions;" rather, the obligation falls only on the covered subdivisions. (USDOJ Brief at 3.)

appear to contradict even their own statements found elsewhere in the record.[35]

And finally, it must be noted that many of the excerpts cited by Appellants actually undercut their proffered construction and support the District Court,[36] while the remainder are contradicted by many other legislators' and witnesses' statements elsewhere in the record.[37]

---

[35] *Compare, e.g.*, Senator Ervin's remarks at CR 8303:

> The bill would deny 34 North Carolina counties *the right to administer their own election procedures* on the ground that less than 50 percent of their adult population voted in the last presidential election.

(Emphasis added.)

[36] Attorney General Katzenbach's quoted comment, for example, clarified that preclearance applies only to the laws of states and political subdivisions "covered by that" (MB 15); Senator Ellender clearly distinguished between the six covered states (Alabama, Louisiana, Mississippi, Georgia, South Carolina, Virginia) and "part of North Carolina" (MB 20); and general comments by "the political leadership" about the importance of the preclearance provision (MB 18-19) clearly cannot be read as *extending* that remedy beyond the bill's covered "states or political subdivisions." Further, Appellants rely on an obvious ambiguity inherent in, for example, references to "legislative bodies" or "affected states" or "sovereign powers" – terms which could embrace covered states and/or separately covered counties.

[37] *See* notes 33 and 35, *ante*.

IX.

APPELLANTS' PROPOSED EXPANSION OF THE PRECLEARANCE PENALTY WOULD NOT SERVE SECTION 5'S PURPOSES AND POLICIES

Contrary to Appellants' circular claims, dismissal of this coverage action does nothing to undercut the purpose, policy, or effectiveness of Section 5, or to "circumvent" Congress' intent. Section 5 preclearance is designed and intended only to provide remedial monitoring for those suspect jurisdictions which Congress has identified as having "resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination". *Katzenbach*, 383 U.S. at 335. The purpose and policy of Section 5 is thus entirely achieved so long as *changes devised by covered jurisdictions*, whether legislative or executive in origin, are suspended *to prevent a repetition of the covered jurisdictions' presumed past pattern of wrongdoing*. *See* J.S.App. 5 and n. 1.[38] No valid policy would be served by stretching Section 5 beyond these logical limits, and basic constitutional principles of federalism – as well as fundamental voting rights of citizens within non-covered jurisdictions – would be gravely compromised by such an approach.

---

[38] The United States appears to concede this focused legislative purpose underlying Section 5 when it describes this Court's *Katzenbach* opinion, at page 335, as "(noting that 'Congress had reason to suppose that *[covered jurisdictions] might try* similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself') . . . " (USDOJ Brief at 22; italics added.)

Furthermore, Appellants' proposed expansion would yield truly bizarre and paradoxical results. Here, for example, the State would be penalized with the preclearance requirement – i.e., treated as a "presumptive wrongdoer" with a record of "ingeniously defying" federal voting rights – only insofar as its enactments and administrative decrees affect four covered counties. With respect to the other 54 counties, and the tens of millions of citizens residing therein,[39] the State would be treated as a respected sovereign whose directives are *presumptively valid*, and it would remain free to implement any voting changes without prior federal review or approval. Thus, under Appellants' unsupported theory, the State would be bifurcated, with respect to election practices, at least, and the Legislature could no longer establish statewide policy: elected state officials would still govern one segment; but the other, a four-county "mini-state," would be controlled by federal authorities (USDOJ and the Washington D.C. District Court). Such patchwork "partial coverage" scenarios are illogical, unworkable, and gravely flawed. Unless a State or subdivision falls within Congress' specific coverage formulae, in which case *any* significant voting change it initiates is subject to the preclearance penalty, it must remain free to exercise its

---

[39] Hispanics constitute a significant percentage of the population in many *non-covered* California counties: 26.6% of the population of Santa Barbara County, for example; 33.3% of Colusa County; 34.5% of Madera County; 37.8% of Los Angeles County; 45.8% of San Benito County; and 65.8% of Imperial County. *California Statistical Abstract 1995*, p. 19, Table B-5. Hispanics constitute 33.6% of Monterey County's population. *Id.*

sovereign rights and powers without federal oversight and prior restraint.

CONCLUSION

For the reasons set forth above, the State of California respectfully asks this Court to affirm the District Court's unanimous December 1998 Orders and Judgment granting the State's motions and dismissing this coverage case. The State further requests that the Stay Order entered by this Honorable Court on January 23, 1998, be dissolved.

Dated: July 31, 1998.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

LINDA A. CABATIC
Senior Assistant Attorney General

MARSHA A. BEDWELL
Supervising Deputy
Attorney General

DANIEL G. STONE
Deputy Attorney General
Counsel of Record

Counsel for Appellee,
State of California